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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL D. BELL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 87A04-0602-CR-61
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE WARRICK SUPERIOR COURT
The Honorable Robert R. Aylsworth, Judge
Cause No. 87D02-0403-FD-24

October 20, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Michael D. Bell challenges his conviction of operating a vehicle while intoxicated ("OVWI") in a manner that endangers a person, a Class A misdemeanor.[1] The trial court did not abuse its discretion in denying four of Bell's challenges for cause during jury selection and an officer's testimony concerning Bell's appearance on the night of his arrest was admissible.

We affirm and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Shortly before midnight on January 16, 2004, Indiana State Police Trooper Kevin Brown noticed Bell's vehicle weaving within its lane. Trooper Brown followed Bell for a few miles and observed Bell speeding. When Bell crossed the centerline, Trooper Brown activated his lights and pulled Bell over. Trooper Brown's car was equipped with a video system, which automatically began recording.

During the traffic stop, Trooper Brown detected "a strong odor of alcohol emanating from [Bell's] person" and noticed his eyes were "red and watery." (Tr. at 121.) Bell was "[s]taggering or stumbling around as he was walking from his driver's side door to the rear of his vehicle." (*Id.*) When asked how much he had to drink, Bell responded, "Quite a few." (*Id.* at 122.) Bell refused to take field sobriety tests. He refused to submit to chemical tests both at the scene and at the Warrick County Jail, even after being informed of the implied consent law.

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[1] Ind. Code § 9-30-5-2(b).

Bell was charged with Count I OVWI (endangerment) as a Class A misdemeanor; Count II, violation of a restricted license as a Class C misdemeanor;[2] Count III, driving left of center as a Class C infraction;[3] Count IV, speeding as a Class C infraction;[4] Count V, implied consent refusal as a Class C infraction;[5] Count VI, OVWI with a prior conviction as a Class D felony;[6] and Count VII, habitual substance offender as a Class D felony.[7] A six-person jury found Bell guilty of Counts I and II; Bell pled guilty to Counts III, IV and V; and the trial court entered convictions on Counts VI and VII because Bell had stipulated to the relevant predicate offenses prior to trial.

The trial court sentenced Bell to 60 days on Count II, to be served concurrently with 18 months on Count VI[8] and consecutively to three years on Count VII. The

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[2] Ind. Code § 9-24-11-8(b).

[3] Ind. Code § 9-21-8-2.

[4] Ind. Code § 9-21-5-2(1).

[5] Ind. Code § 9-30-7-2.

[6] Ind. Code § 9-30-5-3.

[7] Ind. Code § 35-50-2-10.

[8] It is not clear how the trial court treated Count I and whether such treatment was proper, in part because neither party has provided us with an abstract of judgment. The jury found Bell guilty on Count I and, because Bell stipulated to the prior convictions, the trial court found Bell guilty on Counts VI and VII. To avoid a double jeopardy violation, the trial court should have entered a judgment on Counts VI and VII but not on Count I. *See Carter v. State*, 750 N.E.2d 778, 781 (Ind. 2001) (Jury verdict for which no judgment of conviction has been entered presents no double jeopardy problems, vacation of jury verdict not required.). This would be a proper merger of Count I into Count VI and sentencing could proceed on Counts VI and VIII. If the trial court entered judgment for Count I, the entry of judgment should be vacated. *See Jones v. State*, 807 N.E.2d 58, 67 (Ind. Ct. App. 2004), *trans. denied* 822 N.E.2d 969 (Ind. 2004) (double jeopardy violation not remedied by merger after convictions entered, judgment of conviction must be vacated). Accordingly, we instruct the trial court to ensure its abstract of judgment reflects a jury verdict of guilty on Count I, a bench verdict of guilty on Counts VI and VII, an entry of judgment on Counts VI and VII only in order to avoid double jeopardy, and sentencing on Count VI and

resultant four-and-a-half-year sentence was to be served consecutively to a six-month sentence for probation violation for a total executed sentence of five years. The trial court entered judgment for Counts III, IV and V but did not impose fines.

Additional facts will be provided as necessary.

DISCUSSION AND DECISION

1. Voir Dire

The trial court has discretion whether to grant a challenge for cause. *Walker v. State*, 607 N.E.2d 391, 395 (Ind. 1993), *reh'g denied, abrogated on other grounds by Dill v. State*, 741 N.E.2d 1230 (Ind. 2001). Discretion is afforded to the trial court in this situation because the trial judge is in the best position to assess the demeanor of prospective jurors as they answer the questions posed by counsel. *Id.* We will disturb the trial court's decision only if we find this authority was used in an illogical or arbitrary manner, *id.*, and if the trial court's error prejudiced the defendant. *Woolston v. State*, 453 N.E.2d 965, 968 (Ind. 1983).

Twenty prospective jurors were examined as a group during voir dire: Davis, Limp, Downen, Wood, Arosteguy, Loewen, Diehl, King, Bulkley, Boyer, Pietrzyk, Creek, Casey, Ward, Kemman, Henry, Barnes, Johnson, Tabor and Adair. Bulkley indicated she had worked with patients at a substance abuse treatment center for ten years, many of those patients were not honest about their drug and alcohol use, and she had a tendency to "diagnos[e] people all the time," (Tr. at 62), according to the

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VII only. The judgment should continue to reflect a jury verdict of guilty on County II; Bell's pleas of guilty on Counts III, IV and V; and entry of judgment and sentencing on each of those four counts.

characteristics she observed. She stated individuals have a right to refuse a chemical test when stopped by police but continued: "I just don't understand why someone would choose to make that decision if they [sic] felt like they [sic] were innocent." (*Id.* at 61.)[9] Given her views on refusal and her work experience, Bulkley agreed, it would be hard for her to set aside her background when hearing the case. Downen, Wood, Pietrzyk, Casey, Creek, and Davis agreed, to some extent, with Bulkley's comments regarding refusal to take a chemical test.[10]

After the prospective jurors had been examined and removed from the courtroom, the trial court asked for challenges to the first six jurors.[11] The State used peremptory strikes against Limp in the first round and King in the second round. Bell challenged Davis, Downen and Wood for cause in the first round, which challenges were denied. Bell then used his first peremptory strike to remove Davis. Bell challenged Wood for cause again in the second round and used a peremptory strike when the trial court reiterated its denial of the challenge. In the third round, the defense challenged Bulkley for cause, which challenge was granted. Bell challenged Pietrzyk and Creek for cause in the fourth and fifth rounds and used peremptory strikes when those challenges were

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[9] Counsel for Bell attributes this statement to prospective juror Adair. *Compare* Br. of Appellant at 17 *and* Reply Br. of Appellant at 5 *with* Tr. at 60-63.

[10] Not all of the jurors are clearly identified in the transcript by name, including Creek and Davis. It is possible to conclude, from the context, one of the unidentified male jurors is Creek. Whether one of the unidentified female jurors was Davis is more speculative.

[11] As jurors were excused, the next juror on the list was, figuratively, moved into the box and available to be challenged.

denied. In the sixth round, Bell challenged Casey for cause, which challenge was granted.

The final panel consisted of Downen, Arosteguy, Loewen, Diehl, Boyer and Ward.[12] Although he had one peremptory challenge remaining, Bell accepted the panel without striking Downen.

Bell argues it is illogical and arbitrary for the trial court to have removed Casey and Bulkley but not Davis, Downen, Wood, Pietryzk and Creek as they expressed similar opinions. We disagree.

The trial court granted the challenge for cause to Casey because he "doesn't want to be in this courtroom, has no intention of being here, and is doing everything he possibly can do to get himself excused so he can go back to work. He basically has disqualified himself by his own choice[.]" (*Id.* at 92.)

With respect to Bulkley, the trial court granted the challenge for cause because "she has indicated consistently that she has numerous issues that legitimately create a problem for her serving with regard to this case or this type of case." (*Id.* at 87.) Although Davis, Downen, Wood, Pietryzk, and Creek indicated they agreed with Bulkley's views on refusal of a chemical test, the trial court denied the challenges for cause based on their complete responses to the questioning, including their willingness to

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[12] Counsel for Bell asserts prospective juror Adair was the next juror slated to join the panel. (*See* Br. of Appellant at 17.) However, based on the trial court's review of the seating chart, (*see* Tr. at 16-17), it appears prospective juror Kemman would have been the next juror to join the panel. Accordingly, it does not appear that Bell was "forced to choose between" Downen and Adair "who had both expressed prejudicial opinions concerning the defendant's guilt." (Reply Br. of Appellant at 5.) Nor is it clear what prejudicial opinions Adair had expressed. *See* note 9, *supra*.

follow the court's instructions. The trial court's decision was neither absurd nor illogical and thus not an abuse of discretion. *See Jackson v. State*, 597 N.E.2d 950, 961 (Ind. 1992) (trial court's decision not to excuse juror for cause was neither arbitrary nor illogical when juror stated he could apply the law as the court instructed), *reh'g denied*, *cert. denied* 507 U.S. 976 (1993).

2. Videotape

Bell also argues the trial court erred in allowing Trooper Brown to testify as to Bell's appearance on the night of his arrest because the best evidence of his appearance, the video recording from Trooper Brown's car, had been destroyed.[13] The State did not produce the video recording during discovery and, Bell argues, the "State should not reap the benefit of its deceptive discovery practices." (Br. of Appellant at 20.)

The trial court denied Bell's pre-trial motion *in limine* to prevent Trooper Brown from testifying about Bell's appearance but allowed Bell's counsel to present to the jury the issue of the destroyed video recording. When Trooper Brown was asked about Bell's appearance on the night of his arrest, however, Bell's counsel did not object.

Our Indiana Supreme Court

> has consistently held that in order to preserve error in the overruling of a pre-trial motion in limine, the appealing party must also have objected to

[13] Trooper Brown testified the videotapes are routinely destroyed or erased after one year unless the tapes are needed as evidence. He stated he had not received a request to tag the tape to prevent its destruction. Bell's first motion for discovery was filed in February 2004, about a month after his arrest. Two additional discovery requests were filed in May 2005 and October 2005. The May 2005 motion was the first to specifically mention the video recording from Trooper Brown's car; by this time, the tape had been destroyed.

> the admission of the evidence at the time it was offered. Failure to object at trial to the admission of the evidence results in waiver of the error.
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> * * * * *
>
> Because the pre-trial denial of a motion in limine is a preliminary ruling, this denial alone is insufficient to preserve error for an incorrect ruling on the motion. By requiring that an objection be made during the trial at the time when the testimony is offered into evidence, the trial court is able to consider the evidence in the context in which it is being offered and is able to make a final determination on admissibility.

Clausen v. State, 622 N.E.2d 925, 927-28 (Ind. 1993) (internal citations omitted), *reh'g denied*. By failing to object, Bell has waived review of this issue.

Waiver notwithstanding, Bell's claim fails. Trooper Brown's testimony was not offered to prove the contents of the video recording made at the time of the arrest, as contemplated in Ind. Evidence Rule 1002 (the best evidence or original writing rule).[14] Rather, Trooper Brown testified as to what he had personally observed with respect to Bell's appearance and actions, and thus, the best evidence rule is inapplicable. *See Lopez v. State*, 527 N.E.2d 1119, 1125 (Ind. 1988) ("[T]he best evidence rule will not bar the witness['s] testimony since the witness is not being asked to reveal the contents of the best evidence, but rather is being asked to recall his own independent observations.") *and Jackson v. State*, 274 Ind. 297, 300, 411 N.E.2d 609, 611 (Ind. 1980) (Best evidence rule not applicable when witness testifies "as to things he had personally seen and heard" and not "as to the contents of a writing."). The trial court did not err in allowing Trooper Brown to testify as to Bell's appearance.

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[14] Evid. R. 1002 provides: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."

CONCLUSION

The denial of four of Bell's challenges for cause during jury selection was not absurd or illogical and thus not an abuse of discretion. Although waived, Bell's argument about the officer's testimony regarding his appearance also fails on the merits. Accordingly, we affirm but remand so the trial court may clarify its entry of Bell's convictions as outlined in note 8.

Affirmed and remanded with instructions.

BAKER, J., and SULLIVAN, J., concur.